85-1482

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1985

BERTHA TILKENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS JONES, FULLBLOOD SEMINOLE INDIAN, DECEASED,

Petitioner,

v.

BILL PARKS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

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March, 1986

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QUESTIONS PRESENTED

Do the state courts of Oklahoma have a trust responsibility and duty imposed by the United States Congress to apply and strictly construe federal laws affecting inherited restricted land of a member of the Five Civilized Tribes in a probate proceeding involving such lands?

Does a provision in a will of a halfblood Seminole Indian, directing all his just debts be paid as soon as practicable from the funds of his estate, waive the federal statutory exemption of restricted Five Tribes land from forced sale for payment of debts, absent express testamentary direction to sell the restricted lands for that purpose?

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In The

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October Term, 1985

BERTHA TILKENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF THOMAS JONES, FULLBLOOD SEMINOLE INDIAN, DECEASED,

Petitioner,

v.

BILL PARKS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OKLAHOMA

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner Bertha Tilkens, Personal Representative of the Estate of Thomas Jones, deceased fullblood

Seminole Indian, on behalf of the estate and the full-blood Seminole Indian heirs of Thomas Jones, prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of the State of Oklahoma entered in the above case on September 10, 1985, which became final on December 10, 1985 when the Oklahoma Supreme Court refused to review the decision on Writ of Certiorari.

———o———

OPINIONS BELOW

The Opinion of the Court of Appeals of the State of Oklahoma is reported at 710 P. 2d 123 (Okl. App. 1984), and is printed in Appendix A herein. The February 12, 1985 Memorandum Opinion issued by the District Court of Seminole County, State of Oklahoma, which is the subject of the state appeal, is printed in Appendix B.

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JURISDICTION

The judgment of the Court of Appeals of the State of Oklahoma was entered on September 10, 1985. The Court of Appeals denied a timely petition for rehearing on October 10, 1985, and that denial is printed herein as Appendix C. The Oklahoma Supreme Court denied a timely petition for certiorari on December 10, 1985, and that denial is printed as Appendix D. The jurisdiction of the United States Supreme Court is invoked pursuant to 28 U.S.C. § 1257(3).

———o———

STATUTORY PROVISIONS

This case involves the following statutory provisions which are contained in Appendix E: 25 U.S.C. § 355; Act of April 26, 1906, 35 Stat. 137 §§ 22, 23; Act of May 27, 1908, 35 Stat. 312 §§ 4, 9; Act of June 4, 1918, 40 Stat. 606 § 2; Act of April 12, 1926, 44 Stat. 259 §§ 1, 2; Act of May 10, 1928, 45 Stat. 495 § 2; Act of August 4, 1947, 61 Stat. 731 §§ 1, 3(a), 11; Act of August 11, 1955, 69 Stat. 666 §§ 1, 4.

———o———

STATEMENT OF CASE

The deceased, Thomas Jones, recognized by the Bureau of Indian Affairs as one-half Seminole Indian, acquired forty acres of restricted Indian land by Decree of Distribution issued in the probate of his mother's estate on October 17, 1952. R. 42. His mother was a full-blood enrolled Seminole, and the Decree of Distribution states that the land "is hereby set over, transferred, distributed and vested in Thomas Jones, full-blood Seminole Indian, not enrolled, to remain restricted and tax exempt, as provided by the Acts of Congress." R. 42.

On October 6, 1982, Thomas Jones executed a mortgage of the restricted land to his attorney Marshall Huser, less and except two acres previously sold. R. 44. The purpose of the mortgage was to secure a loan in the amount of $1,100.00. On that same date, Thomas Jones executed a will prepared by Marshall Huser, which directed the executrix of his estate to sell his land if the

loan to Huser was not paid at his death, and to use the proceeds to pay the debt to Huser, plus the funeral expenses and expenses of last illness. The only other proviso in the will concerning Jones' debts directed the payment of all just debts, expenses of last illness, funeral expenses, and administration expenses "from the funds of my estate." (See Appendix A, which contains the text of the will.)

The will was approved by the Seminole County Court the same day, on October 6, 1982, as required for wills of fullblood Seminole Indians under certain circumstances. Approximately a month later, on November 12, 1982, the Seminole County Court approved the mortgage as required by federal law, and it was filed of record in the Seminole County Clerk's office. On the same day, Thomas Jones executed a mortgage of the restricted land to Respondent Bill Parks, which was later also approved by the state court. In December 1982, Marshall Huser released the first mortgage, and filed the release with the Seminole County Clerk's office.

Thomas Jones died on February 15, 1984. His will was admitted into probate on June 12, 1984, and Petitioner Bertha Tilkens was appointed Personal Representative. R. 9. At that time the court decreed that the sole and only heirs at law, legatees, and devisees of Thomas Jones were his children, Bertha Tilkens, Thomas F. Jones, and Geneva Jones. R. 9. Each of these children is recognized by the Bureau of Indian Affairs as three-fourths Seminole Indian.

The Personal Representative published notice to creditors in July, 1984, but disallowed each claim subsequently

submitted to her, because the only substantial asset of the estate consisted of the thirty-eight acres of restricted Indian land. R. 12. On October 5, 1984, the Petitioner filed an application requesting the trial court to determine if the restricted Indian land had to be sold to pay the disallowed claims. R. 16. On December 13, 1984, the Court issued default judgment against all creditors except Respondent Bill Parks, who had filed a claim in the amount of $2845.75 against the estate. On February 11, 1985, the Court ruled that "it was the intent of the testator that the restricted property be sold if necessary to pay the debts of his estate." R. 48.

The Petitioner filed an interlocutory appeal on this ruling as a matter of right on March 11, 1985. The Oklahoma Court of Appeals affirmed the trial court's decision on September 10, 1985. The Court of Appeals denied a timely petition for rehearing on October 10, 1985. The Oklahoma Supreme Court denied a timely petition for Certiorari on December 10, 1985, and mandate issued on December 20, 1985.

The Petitioner has filed a motion for a stay of the judgment directing sale of the restricted land, which is pending before the Seminole County District Court. The land has not been conveyed, and remains in its restricted status.

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REASONS FOR GRANTING THE WRIT

A. THE OKLAHOMA COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL INDIAN LAW IN A MANNER CONTRARY TO PRINCIPLES INVOLVING PROTECTION OF INDIAN RIGHTS ESTABLISHED BY THE UNITED STATES SUPREME COURT.

The Oklahoma Court of Appeals has rejected Petitioner's argument that Section 4 of the Act of May 27, 1908, 35 Stat. 315 (hereinafter referred to as the 1908 Act), as extended to inherited lands of Indians of half-blood or more by Section One of the Act of August 4, 1947, 61 Stat. 731 (hereinafter referred to as the 1947 Act), exempts restricted Indian land from payment of debts of a deceased restricted Five Tribes Indian, unless his will expressly directs the sale of the land for payment of debts. Instead, the Court found that the will showed "testamentary intent" that the restricted land be sold to pay the debts of the estate. The Court acknowledged that a provision in the will directing sale of the land to pay Huser's debt was inoperative once the debt was satisfied, but found that the provision indicated a willingness and knowledge that the land could be sold to pay debts in general. The Court found this "willingness" sufficient to override the federal law exemption of restricted lands from payment of debts, contrary to long-standing principles regarding construction of federal Indian land laws.

A review of the decision of the Oklahoma Court of Appeals in this case is crucial to the validity of Indian land titles in the future. A review of the decision is also crucial to the fulfillment of the responsibility bestowed by Congress on the state courts for protecting restricted Five Tribes Indians in eastern Oklahoma. The state courts

act as federal instrumentalities in many of their functions involving restricted Indian land. See *Parker v. Richard*, 250 U.S. 235, 239 (1919); *Parnacher v. Mount*, 207 Okla. 275, 248 P.2d 1021 (Okl. 1952). It follows that the duty of the federal government to safeguard Indian interests and protect them against the greed of others and their own improvidence, as recognized in *Sunderland v. United States*, 266 U.S. 236 (1924), extends to the state courts acting as federal instrumentalities.

This responsibility must not be ignored by the highest court of the State of Oklahoma. The Seminole Nation once owned all of Seminole County in fee. The Nation was divested of its fee title to the land by allotment at the turn of the century, and its members have steadily been divested of ownership since statehood. This Court's failure to construe any ambiguities in the federal laws protecting Five Tribes restricted land in favor of the Indians as required by the canon of construction recognized by this Court in numerous cases will eventually lead to the complete loss of land ownership by members of the Five Tribes who are at least one-half Indian, many of whom are bilingual and have yet to grasp the intricacies of the legal system. *Choctaw Nation v. United States*, 318 U.S. 423, 431-432 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1914).

Yet in spite of the responsibility of the Oklahoma Courts to look to the federal laws governing restricted Five Tribes land, the Oklahoma Court of Appeals chose to force a square peg into a round hole: It took a federal Indian law issue and forced it into the context of non-Indian will construction as defined by state law. The Court intentionally ignored the governing federal law, stating that a discussion of "the historical aspects of very

extensive acts of Congress" concerning the restricted status of the land "is unnecessary for a determination of the appeal." The Court's apparent lack of knowledge on the subject of those "very extensive" acts is highlighted by its sweeping statement that Oklahoma acquired jurisdiction over restricted land by virtue of 25 U.S.C. § 355, a statute which only bestows jurisdiction over partition of restricted Five Tribes land on the Oklahoma Courts.

In fact, Congress has granted very limited jurisdiction over restricted Indian lands to the state courts.[1] The state courts are authorized to approve the wills of fullblood Indians, acting as federal instrumentalities in exercising this ministerial, as opposed to judicial, function. *Parnacher v. Mount*, supra. State courts have authority to approve conveyances of restricted lands, again acting as federal instrumentalities in exercising that function. *Parker v. Richard*, supra. Finally, state courts have jurisdiction over partition actions, 25 U.S.C. § 355, and over administration proceedings, determination of heirship proceedings, and probate proceedings involving restricted Indian lands. Act of August 4, 1947, 61 Stat. 731, supra, § 3.

Although the state courts have jurisdiction over probate cases involving Indian lands, Congress has never directed that state law controls probate actions to the exclusion of federal law. The state courts possess only that limited authority over restricted Five Tribes land expressly granted to them by Congress. *Grisso v. United States*, 138 F. 2d 996 (10th Cir. 1943). The Oklahoma Court of Appeals exceeded its limited authority in this case by failing to take note of the Congressional intent behind the ap-

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[1]Congress also has made state laws applicable in very limited circumstances. See Act of April 12, 1926, 44 Stat. 259 § 2; Act of May 27, 1908, 35 Stat. 312, § 9; and Act of August 4, 1947, 61 Stat. 731, § 11.

plicable federal laws and instead applying a state standard of "testamentary intent," contrary to this Court's recent pronouncement that "[T]he standard principles of statutory construction do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe of Indians*, — U.S. —, 105 S.Ct. 2399, 53 U.S.L.W. 4625 (June 3, 1985).

The Court of Appeals' decision in this case is inconsistent with the Federal Trust responsibility, which the state courts possess as instrumentalities of the federal government in cases involving restricted Indian lands. The restricted properties of members of the Five Tribes cannot be fully protected unless the exemption from debt contained in § 4 of the 1908 Act is given effect. Congress could simply have removed restrictions from these lands if it had wished to do so, but it did not. Acts of Congress restricting alienation of Indian allotments must be construed in light of the policy of Congress to promote the welfare of Indians as wards of the United States. *Drummond v. United States*, 131 F. 2d 568 (10th Cir. 1942). The Oklahoma Court of Appeals should not be permitted to ignore that policy in construing the will of a restricted Indian.

B. THE OKLAHOMA COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL INDIAN LAW IN A MANNER WHICH IS NOT CONSISTENT WITH OTHER DECISIONS OF THE OKLAHOMA SUPREME COURT.

While petitioner recognizes that this Court does not normally review a state decision with reference to its consistency with past state decisions, past state decisions

are important in this particular case because Oklahoma Courts have been largely responsible for interpreting federal Five Tribes land laws. In *Cate v. Beasley*, 299 U.S. 30 (1936), a case involving state application of federal laws affecting Five Tribes inheritance, this Court stated the rule that where the federal question involved has only a limited operation in a particular state, the decisions of the state *if they have been consistent over a period of years*, will usually not be disturbed by this court.

Neither this case nor the other two appellate cases in Oklahoma involving the application of § 4 of the 1908 Act to payment of debts of deceased testate restricted Five Tribes Indians are consistent with the principles set out in the numerous other Oklahoma decisions involving § 4 of the 1908 Act. The Oklahoma Supreme Court has held that § 4 of the 1908 Act exempted restricted lands of intestate Five Tribes members from sale for payment of debts of the estate in numerous cases. *Kolb v. Ball*, 101 Okla. 100, 223 P. 660 (1924); *Keil v. Baker*, 91 Okla. 128, 216 P. 640 (Okl. 1923); *Sandlin v. Barker*, 95 Okla. 113, 218 P. 519 (Okl. 1950); *Pickens v. Glass*, 92 Okla. 65, at 66, 218 P. 1071 (Okl. 1923); and *Dawes v. Brady*, 112 Okla. 289, 241 P. 147 (Okl. 1925).

Rather than examining the reasoning of these cases, the Oklahoma Court of Appeals relied on *Tucker v. Masters*, 97 Okla. 70, 222 P. 259 (Okl. 1923) and *Matter of Estate of Brown*, 600 P. 2d 857 (Okl. 1979). The *Tucker* case characterized § 4 of the 1908 Act as an exemption from indebtedness, but rather summarily determined that the exemption could be waived by a simple general testamentary direction that debts of the estate be paid.

In the second case relied upon, *Matter of Estate of Brown,* the Oklahoma Supreme Court based its decision that restricted land could be sold to pay a specific debt of an estate of a testate Five Tribes member, where the will expressly directed sale of the restricted land to pay the debt, on two false premises: that the exemption in § 4 of the 1908 Act only applied to allottees, not heirs of allottees, and that the restrictions on Jones' lands were removed at death pursuant to § 1 of the 1947 Act. This dictum has had dire consequences in the present case, and will continue to destroy federal protections of Five Tribes restricted land in future unless this Court intercedes. It should be noted in this regard that the *Brown* dictum is not in accord with *Boyd v. Weer*, 124 Okla. 91, 253 P. 988 (Okl. 1926), which held that *inherited* restricted land is not available to pay the debts of a deceased heir. It is not in accord with *In Re Cully's Estate*, 276 P. 2d 250 (Okl. 1954), which acknowledged that "there is no distinction in principle" between the 1947 Act restrictions on Indians of one-half or more degree of Indian blood, and the restrictions placed on fullblood Indians by the 1908 Act.

The actual result in *Brown* was correct, since the United States Supreme Court established in *Blundell v. Wallace*, 267 U.S. 373 (1925) that the effect of § 23 of the Act of April 26, 1906, 34 Stat. 137, was to remove a restriction theretofore existing upon the testamentary power of Five Tribes members. However, this Court needs to correct the dictum in *Brown*, and clarify the *Blundell* case to establish that the testamentary power of the restricted Indian to devise restricted lands as he sees fit does not result in the automatic sale of his restricted lands when

his will includes a direction to pay debts of the estate. Oklahoma law applicable to nonIndian estates requires payment of all debts prior to distribution, 58 O.S. § 381, and a testamentary direction that this be done is surplusage and meaningless. *In Re Fletcher's Estate*, 308 P. 2d 304 (Okl. 1957). Thus, even with reference to state law, testamentary intent to sell restricted land should not be derived from a direction to pay debts in a will of a restricted Indian.

C. THE OKLAHOMA COURT OF APPEALS HAS DECIDED A QUESTION OF FEDERAL LAW IN A MANNER WHICH IS INCONSISTENT WITH RELATED DECISIONS OF THE 10TH CIRCUIT COURT OF APPEALS AND THE UNITED STATES SUPREME COURT.

The decision in this case is not in accord with applicable federal case law. It is not in accord with *Shade v. Downing*, 333 U.S. 586 (1948), which does *not* stand for the principle that restrictions are removed at death, as suggested by the Oklahoma Supreme Court in the *Brown* case. The Court in *Shade* simply found that restrictions do not prevent inheritance, and that death of the allottee operates to remove restrictions as to passage of title to heirs. Id. at 589. The Court in *Shade* held that the state court heirship proceeding did not directly affect restrictions on the land or the land itself. The legislative history of the Act of August 11, 1955, 69 Stat. 666 clearly states that restrictions do not end at death. S. Rep. No. 845, 84th Cong., 1st Sess. (1955) reprinted in [1955] U.S. Code Cong. & Admin. News.

The decision in this case is also not in accord with *Armstrong v. Maple Leaf Apartments*, 508 F. 2d 518 (10th

Cir. 1974); cert. den. 449 U.S. 901 (1980). The Tenth Circuit there held that the 1947 Act extended the underlying policy applicable to fullblood Indians to half-blood heirs, and held that a state court may not approve a conveyance of restricted land without the voluntary consent of the restricted Indian owner. The *Armstrong* case is relevant to the present case, because the issue here is whether a *forced* sale of Thomas Jones' land against the will of his heirs to satisfy debts of his estate is legal, based upon an implied waiver of a federal statutory exemption in the form of a finding of "testamentary intent." The present case does not raise the issue whether Thomas Jones had the testamentary power to *expressly* direct the sale of his land to pay specific debts as suggested by the Court of Appeals. Petitioners admit that Thomas Jones had the power to authorize a conveyance to pay all of his debts, but he did not do so. He only authorized a conveyance to satisfy the mortgage held by his attorney, Marshall Huser, and that authorization became inoperative upon the release of the mortgage, which occurred before Jones' death. To permit a restricted Indian voluntarily to dispose of a portion of his land is one thing; to permit his creditors by process of law, to seize from him the title to that land, in satisfaction of an antecedent indebtedness, is another and quite different proposition. See *In Re French's Estate*, 45 Okla. 819, 147 P. 319 (Okl. 1915).

The reliance of the Oklahoma Court of Appeals in this case on the *Brown* case is also inconsistent with a Tenth Circuit Court of Appeals interpretation of the 1908 Act, *Chisholm v. House*, 160 F. 2d 632 (10th Cir. 1947). In that case the court did not restrict applicability of § 2 of the 1908 Act to allottees, even though § 2 dealt with

leases of lands by "allottees." The court instead applied the requirements of § 2 of the 1908 Act to a lease by a devisee of an allottee, recognizing that the lands were still restricted under the terms of § 9 of the 1908 Act. Yet the *Brown* case expressly refused to follow the reasoning in the *Chisholm* case, and found § 4 of the 1908 Act only applied to allottees, not heirs of allottees. *In Matter of Estate of Brown*, supra at 859.

CONCLUSION

This case raises important questions regarding the responsibility of the state courts to protect restricted lands of members of the so-called Five Civilized Tribes who are of one-half or more degree of Indian blood. Although Congress gave state courts authority to probate estates of these restricted Indians in 1947, Congress did not give the state courts authority to lightly dismiss its responsibility to enforce federal laws designed to protect its wards.

This case further raises important questions involving the continuance of the restricted status of Indian lands. It will result in the routine sale of restricted Indian lands for payment of debts in probate cases, since standard wills in Oklahoma routinely direct payment of debts of the estate, and the average practitioner in Oklahoma is not well acquainted with federal Indian law. The reliance of this case upon the *Brown* case, with its faulty ruling that restrictions on Five Tribes land end at death, also will have devastating consequences to the restricted status of Indian lands in the eastern half of Oklahoma.

Respectfully submitted,

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March, 1986

APPENDIX A

THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

Division No. 3

Case No. 63,965

In The Matter of the Estate of THOMAS JONES, Deceased.

BERTHA TILKENS, et al.,

Appellants,

v.

Bill Parks,

Appellee.

APPEAL FROM THE DISTRICT COURT OF
SEMINOLE COUNTY, OKLAHOMA

HONORABLE GARY BROWN, JUDGE

The trial court admitted the Last Will and Testament of a Seminole Indian to probate and ordered his restricted land sold to pay his debts. Indian heirs appeal.

AFFIRMED

Susan Work Haney
Oklahoma Indian Legal Services — For Appellants,

William D. Huser
Wewoka, Oklahoma, — For Appellees.

Opinion by Carol M. Hansen, Judge:

Does a provision in a will of Seminole Indian of half-blood, directing all his just debts be paid as soon as prac-

ticable from the funds of his estate, waive the federal statutory restriction against alienation of the property and allow the sale of the property to pay his debts? We answer this narrow question in the affirmative.

Thomas Jones died testate owning 38 acres of restricted land in Seminole County, a 1972 Oldsmobile station wagon, and little else. A petition for Letters of Administration with Will Annexed was filed by his heirs, Thomas Jones and Bertha Tilkens, appellants herein. The will was admitted to probate and Bertha Tilkens was appointed personal representative. Eight creditors filed claims against the estate, all of which were disallowed by Tilkens.

Tilkens filed the disallowed claims with an application asking the trial court to determine if the 38 acres of restricted land could be sold to satisfy these claims. The court rendered default judgment against all creditors except Bill Parks, appellee herein. He is the only creditor involved in this appeal.

Thomas Jones' Will provided in pertinent part:

> I.
>
> I direct that all my just debts, the expense of my last illness, my funeral expenses and the expense of my administration be paid as soon as practicable from the funds of my estate.
>
> II.
>
> I declare that I owe a note and mortgage to Marshall Huser for the principle amount of $1,000.00 and if it is not paid when I die, I want my Executrix to sell my land and used the proceeds of the sale to pay off the note and mortage, pay my funeral bill and

the expense of my last illness and if there is any money left,

I hereby give, devise and bequeath any money left to my beloved daughter, Bertha Tilkins and my son, Thomas Jones, Jr., in equal shares.

III.

I hereby appoint my dear friend, Mary Robinson, of Okemah, Oklahoma, as Executrix of this my Last Will and Testament. She to serve without bond.

IV.

All the rest and residue of my estate, I hereby give, devise and bequeath to my daughter, Bertha Tilkins and my son, Thomas Jones, Jr., in equal shares.[1]

Thomas Jones executed this will on the same date he executed the mortgage to Marshall Huser mentioned in the will. Mr. Huser released the mortgage on December 16, 1982. On November 12, 1982, Thomas Jones had executed another mortgage in favor of Appellee, securing a debt of approximately $2,800.00. Appellee sought to have the land sold to satisfy this debt.[2]

The matter came on for hearing on Tilkens' request for a determination of the exempt status of the restricted land. The court found the will to be valid. It also found it was the intent of Jones that the restricted land be sold

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[1]Although the will did not mention his daughter Geneva Jones, the trial court determined she was also a legal heir. This is not challenged.

[2]Parks also filed a separate action to foreclose his mortgage. That action is not a part of this appeal.

if necessary to pay the debts of his estate. The Indian heirs appeal.

Jones inherited the land from his mother, a full-blooded enrolled Seminole Indian, the original allottee. Her will stated the land was to remain restricted and tax exempt, as provided by the Acts of Congress." The parties stipulated the land was still restricted at the time of Jones' death.

Land originally allotted to the Seminole tribe, as one of the Five Civilized Tribes, could not be alienated without compliance with certain restrictions which have run with the land since it was allotted. 25 U.S.C. § 355 (1983) authorizes state court jurisdiction over land belonging to the Five Civilized Tribes. Other Acts of Congress govern the restrictions.[3]

A discussion of the historical aspect of the very extensive Acts of Congress significant to the issue of the nature of the land in the hands of the heirs as restricted or unrestricted is unnecessary for a determination of this appeal. The issues can be resolved by examining Oklahoma case law.

Tucker v. Master, 97 Okla. 70, 222 P. 259 (1923), dealt with a situation very similar to the present case, except the testator there was the original allottee of the restricted land. In that case the allottee's will provided:

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[3]Act of April 26, 1906, 34 Stat. 137
Act of May 27, 1908, 35 Stat. 312
Act of August 4, 1947, 61 Stat. 731
Act of August 11, 1955, 69 Stat. 666

> "First I direct the payment of my legal debts and funeral expenses.
>
> Second. I give and devise to my niece, Annie Tucker, with whom I have made my home for the last seven or eight years and who has largely supported and cared for me during said time, all my real estate, consisting of an allottment of Cherokee Indian land."

The executor petitioned the court asking that he be permitted to sell a portion of the allotment to pay the expenses of the last illness, funeral expenses, and administration of the estate. The order was granted. Annie Tucker appealed, claiming the executor had no right to sell the restricted land to satisfy claims against the testator. The Oklahoma Supreme Court held there was no prohibition against an Indian executing a will disposing of his allotment, citing § 23 of the Act of Congress April 26, 1906, 34 Stat. 145 as amended by the Act of May 27, 1908 § 8, 35 Stat. 315. This section states:

> "Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: Provided, that no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent (wife), spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States commissioner, or a judge of a county court of the State of Oklahoma."

The court held in view of the fact Congress specifically authorized the execution of a will, it saw no good reason why the provisions in the will directing payment of her just debts should not be upheld. It affirmed the trial court's order of sale.

Tucker was cited with approval in *In the Matter of the Estate of Brown,* 600 P. 2d 857 (Okla. 1979). In that case the will provided for a power of sale, but the holding of the decision was the same. An Indian heir to real property, who took title from a full-blooded allottee of such land, may, by will, order such premises sold to satisfy his debts.

In their brief Appellants agree Thomas Jones had the right to dispose of his restricted land by will and to authorize its sale to pay his debts. But Appellants claim the will did not expressly authorize the sale of his land. Thus it remains restricted in the hands of his heirs and not subject to sale to satisfy Jones' debt to Appellee.

Appellants argue use of the words "funds" meant liquid assets, not realty. In addition, they make a strong point that had the proviso directing payments of his debts been indicative of his intent the land should be sold to satisfy his debts, then the proviso directing the sale of the land to satisfy his debt to Huser would have been surplusage and inoperative.

A provision in a will relating to debts is directory only and cannot be construed as an intention that it come from a particular portion of the estate.[4] Generally all of a decedent's property is charged with liability for payment of debts. If no property is expressly appropriated by the will for such purpose, 84 O.S. 1981 § 3(3) provides debts should be paid from property devised to a residuary legatee.

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[4] *In re Fletcher's Estate,* 308 P.2d 304 (Okla. 1957)

The mortgage to Huser has been released. There is no other mention of the land in the will. It becomes part of the residuary estate and would be routinely charged with the Jones' debts were it not for its restricted character.

Was it the intent of Thomas Jones that his land be sold to satisfy his debts? We believe it was. He expressly stated he wanted his debts paid. The proviso ordering the land sold and the proceeds used to satisfy his debt to Huser indicate a willingness for the land to be sold for that purpose.

Where a testator's intention is plainly expressed in the will, the reviewing court cannot deduce from surrounding circumstances an intention different therefrom.[5]

Jones' will stated he wished his debts to be paid. He did not specifically devise his restricted land to anyone. He acknowledged the land could be sold to satisfy a debt. *Tucker* is still the law in Oklahoma and it controls the situation here.

AFFIRMED

Hunter, P.J. and Howard, J. concur.

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[5]*Noble v. Noble*, 205 Okla. 91, 235 P.2d 670, 26 ALR2d 1200 (1951)

APPENDIX B

IN THE DISTRICT COURT OF SEMINOLE COUNTY
SEMINOLE DIVISION
STATE OF OKLAHOMA

No. SP-84-26

IN THE MATTER OF THE ESTATE OF
THOMAS JONES, Deceased

MEMORANDUM

This matter came on for hearing the 4th day of February, 1985, on the Request for Determination of Exempt Status of Real Property. Upon consideration ofthe stipulations and briefs of the parties, the court finds:

1) The will on file in this case is valid. There is no showing that the pretermitted child, Geneva Jones, was intentionally omitted from the will. She must share equally in the estate with the other two children, Bertha Tilkens and Thomas F. Jones.

2) The provision in the will that the restricted property be sold to pay the expenses of the testator's last illness and funeral expenses was not conditioned on the requirement that his mortgage to Marshall Huser be unpaid at his death. Considering the circumstances and the will as a whole, it was the intent of the testator that the restricted property be sold if necessary to pay the debts of his estate.

DATED this 11th day of February, 1985.

/s/ Gary Brown
District Judge

APPENDIX C

THE COURT OF APPEALS, DIVISION 3,
STATE OF OKLAHOMA

OCTOBER 10, 1985

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

63,965—In the Matter of the Estate of Thomas Jones, Deceased. Bertha Tilkins. et al., Appellants v. Bill Parks, Appellee.

Appellants' petition for Rehearing is DENIED

/s/ Stewart M. Hunter
STEWART M. HUNTER, Presiding Judge

APPENDIX D

IN THE SUPREME COURT OF THE
STATE OF OKLAHOMA

Tuesday, December 10, 1985

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

* * *

63,965 IN MTR. ESTATE OF THOMAS JONES, DECD.
BERTHA TILKENS, et al. v. BILL PARKS.

CERTIORARI DENIED

CONCUR: Simms, C. J., Doolin, V.C.J., Hodges, Lavender, Opala, Wilson, Summers, JJ.

NOT PARTICIPATING: Hargrave, Kauger, JJ

/s/ Robert D. Simms
Chief Justice

APPENDIX E

STATUTORY PROVISIONS

Act of April 26, 1906, 34 Stat. 137, § 22

* * * All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe.

Act of April 26, 1906. 34 Stat. 137, § 23

Every person of lawful age and sound mind may by last will and testament devise and bequeath all of his estate, real and personal, and all interest therein: *Provided*, That no will of a full-blood Indian devising real estate shall be valid, if such last will and testament disinherits the parent, wife, spouse, or children of such full-blood Indian, unless acknowledged before and approved by a judge of the United States Court for the Indian Territory, or a United States commissioner.

Act of May 27, 1908, 35 Stat. 312. § 4

That all land from which restrictions have been or shall be removed shall be subject to taxation and all other civil burdens as though it were the property of other persons than allottees of the Five Civilized Tribes: *Provided*, That allotted lands shall not be subjected or held liable, to any form of personal claim, or demand, against, the allottees arising or existing prior to the removal of restrictions other than contracts heretofore expressly permitted by law.

Act of May 27, 1908, 35 Stat. 312, § 9

That the death of any allottees of the Five Civilized Tribes shall operate to remove all restrictions upon the

alienation of said allottee's land: *Provided,* That no conveyance of any interest of any full-blood Indian heir in such land shall be valid unless approved by the court having jurisdiction of the settlement of the estate of said deceased allottee. * * * *Provided further,* That the provisions of section twenty-three of the act of April twenty-sixth, nineteen hundred and six, as amended by this act, are hereby made applicable to all wills executed under this section.

Act of June 14, 1918, 40 Stat. 606, § 2, codified at 25 U.S.C. § 355

That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.

Act of April 12, 1926, 44 Stat. 239, § 1

Be it enacted by the Senate and the House of Representative of the United States of America in Congress assembled, That Section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), entitled "An Act for the removal of restrictions on part of the lands of allottees of the Five Civilized Tribes, and for other purposes," be, and the same is hereby, amended to read as follows:

"SEC. 9. The death of any allottee of the Five Civilized Tribes shall operate to remove all restrictions upon the alienation of said allottee's land: *Provided,* That here-

after no conveyance by any full-blood Indian of the Five Civilized Tribes of any interest in lands restricted by section 1 of this Act acquired by inheritance or devise from an allottee of such lands shall be valid unless approved by the county court having jurisdiction of the settlement of the estate of the deceased allottee or testator: *Provided further,* That if any member of the Five Civilized Tribes of one-half or more Indian blood shall die leaving issue surviving, born since March 4, 1906, the homestead of such deceased allottee shall remain inalienable. unless restrictions against alienation are removed therefrom by the Secretary of the Interior for the use and support of such issue, during their life or lives, until April 26, 1931; but if no such issue survive, then such allottee, if an adult, may dispose of his homestead by will free from restrictions; if this be not done, or in the event the issue hereinabove provided for die before April 26, 1931, the land shall then descend to the heirs, according to the laws of descent and distribution of the State of Oklahoma, free from all restrictions: *Provided,* That the word "issue" as used in this section shall be construed to mean child or children: *Provided further,* That the provisions of section 23 of the Act of April 26, 1906, as amended by this Act, are hereby made applicable to all wills executed under this section; *And provided further,* That all orders of the county court approving such conveyances of such land shall be in open court and shall be conclusive as to the jurisdiction of such court to approve such deed: *Provided,* That all conveyances by full-blood Indian heirs heretofore approved by the county courts shall be deemed and held to conclusively establish the jurisdiction of such courts to approve the same except where more than one such conveyance of the same interest in the same land has been made by the same Indian to

different grantees and approved by county courts of different counties prior to the passage of this Act, and except that this proviso shall not affect and may not be pleaded in any suit brought before the approval of this Act."

Act of April 12, 1926, 44 Stat. 239, § 2

The statutes of limitations of the State of Oklahoma are hereby made and declared to be applicable to and shall have full force and effect against all restricted Indians of the Five Civilized Tribes, and against the heirs or grantees of any such Indians, and against all rights and causes of action heretofore accrued or hereafter accusing to any such Indians or their heirs or grantees, to the same extent and effect and in the same manner as in the case of any other citizen of the State of Oklahoma, and may be pleaded in bar of any action brought by or on behalf of any such Indian, his or her heirs or grantees, either in his own behalf or by the Government of the United States, or by any other party for his or her benefit, to the same extent as though such action were brought by or on behalf of any citizen of said State.

Act of May 10, 1928, 45 Stat. 495, § 2

That the provisions of Section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), entitled "An Act for the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes," as amended by section 1 of the Act of April 12, 1926 (Forty-fourth Statutes at Large, page 209), entitled "An Act to amend section 9 of the Act of May 27, 1908 (Thirty-fifth Statutes at Large, page 312), and for putting in force, in reference to suits involving Indian

titles, the statutes of limitations of the State of Oklahoma, and providing for the United States to join in certain actions, and for making judgments binding on all parties, and for other purposes "be and are thereby extended and continued in force for a period of twenty-five years from and including April 26, 1931. . . ."

Act of August 4, 1947, 61 Stat. 731, § 1

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all restrictions upon lands in Oklahoma belonging to members of the Five Civilized Tribes, whether acquired by allotment, inheritance, devise, gift, exchange, partition, or by purchase with restricted funds, of whatever degree of Indian blood, and whether enrolled or unenrolled, shall be and are hereby, removed at and upon his or her death: *Provided,* (a) That except as provided in subdivision (f) of this section, no conveyance, including an oil and gas or mineral lease, of any interest in land acquired before or after the date of this Act by an Indian heir or devisee of one-half or more Indian blood, when such interest in land was restricted in the hands of the person from whom such Indian heir or devisee acquired same, shall be valid unless approved in open court by the county court of the county in Oklahoma in which the land is situated.

Act of August 4, 1947, 61 Stat. 731, § 3(a)

The State courts of Oklahoma shall have exclusive jurisdiction of all guardianship matters affecting Indians of the Five Civilized Tribes, of all proceedings to administer estates or to probate the wills of deceased Indians of the

Five Civilized Tribes, and of all actions to determine heirs arising under section 1 of the Act of June 14, 1918 (40 Stat. 606).

Act of August 4, 1947, 61 Stat. 731, § 11

All restricted lands of the Five Civilized Tribes are hereby made subject to all oil and gas conservation laws of Oklahoma: *Provided,* That no order of the Corporation Commission affecting restricted Indian land shall be valid as to such land until submitted to and approved by the Secretary of the Interior or his duly authorized representative.

Act of August 11, 1955, 69 Stat. 666, §-1

That subject to the provisions of Section 2 of this Act, the period of restrictions against alienation, lease, mortgage, or other encumbrance of lands belonging to Indians of the Five Civilized Tribes in Oklahoma of one-half degree or more Indian blood, which period was extended to April 26, 1956, by the Act of May 10, 1928 (45 Stat. 405), is hereby extended for the lives of the Indians who own such lands subject to such restrictions on the date of this Act.

Act of August 11, 1955, 69 Stat. 666, § 4

Except as provided in Section 2 of this Act, nothing in this Act shall be construed to repeal or to limit the applications of the Act of August 4, 1947 (61 Stat. 731), the provisions of which shall continue in effect until otherwise provided by Congress.